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In The

Supreme Court of the United States

October Term 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF INDUSTRIAL INDEMNITY INSURANCE COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Section 22 of the Longshore and Harbor Workers' Compensation Act permits modification of a compensation award when successful retraining and reemployment efforts increase the worker's earning capacity.

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INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed, with the consent of the parties, by Industrial Indemnity Insurance Company in support of Petitioner.

In 1920, Contractors Insurance Agency of California, a forerunner of Industrial Indemnity, was founded. A year later, in 1921, Contractors Indemnity Exchange, a reciprocal of Contractors Insurance Agency of California, was founded. In 1931, Mr. K. K. Bechtel assumed chairmanship of the advisory committee of the two companies and continued to lead the organization for the next 40 years. The organization became known as Industrial Indemnity Insurance Company in 1933.

From 1934 through 1939, the company insured contractors of major public works projects in the State of California and the western United States, including the Golden Gate Bridge, the San Francisco Bay Bridge, Shasta Dam, Hunters Point Drydocks, Hetch Hetchy Dam, and the Colorado River Aqueduct.

The company led the industry in implementing safety procedures to minimize losses by issuing hard hats at construction sites and establishing field hospitals at isolated construction locations to ensure prompt medical care for injured workers. In 1935, the company's premium volume hit one million dollars. In 1942, the company drafted and published its first edition of *Safety Engineering Standards*, which became an industry standard and is still in circulation.

During World War II, Kenneth Bechtel founded Marin Ship shipyard in Sausalito, California, and his

brother, Steven Bechtel, founded Cal Ship shipyard in Oakland, California. In 1945, Industrial Indemnity celebrated its 25th anniversary with premiums topping ten million dollars.

Post war, Industrial Indemnity expanded its operations across state borders, hiring its own staff counsel for policyholder defense in 1953 and installing IBM computers in 1955. In 1960, leadership of the company was assumed by Mr. Fred Drexler, a member of the State of California Governor's Commission on reform of workers' compensation laws, who continued to guide the company's economic growth and played a major role in the 1977 reform of California state workers' compensation programs.

We respectfully submit that Industrial Indemnity's historical presence in the industry since the inception of the Longshore Act, its essential role in developing the maritime workers' compensation insurance industry, and its vast experience in delivering compensation benefits to injured workers lends a valuable perspective on the question presented for review.

SUMMARY OF ARGUMENT

The Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. 901, et seq., was created by Congress in 1927 to provide a unique workers' compensation scheme for a discrete class of maritime employees who were not subject to state workers' compensation

laws.[1] In creating the Act and delegating to the Department of Labor its administration and adjudication of claims arising under it, Congress attempted to balance the conflicting interests of injured maritime employees in need of certainty of recompense and those of employers in need of economic protection from the costs of maintaining liability insurance.[2]

Throughout its history, the Act and its subsequent amendments have reflected, in both design and administration, public policy concerns to provide adequate compensation to injured workers and reduce economic waste. Certain provisions of the 1927 Act, unchanged by subsequent amendments, mandate that each covered employer provide compensation benefits as defined by the Act and either purchase insurance or prove to the Secretary of Labor that it has the financial ability to pay such compensation.[3] However, the Act has consistently and expressly defined disability on the basis of economic loss associated with a physical impairment, and awarded disability compensation for specific types of injuries only if those injuries lessen the worker's wage earning capacity.[4]

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[1] 33 U.S.C. 903 (1927); *Southern Pacific Co. v. Jensen*, 224 U.S. 205 (1917).

[2] *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980).

[3] 33 U.S.C. 904, 932.

[4] 33 U.S.C. 902 (10); 33 U.S.C. 908(c)(21); *see generally*, 2 A. Larson, *The Law of Workmen's Compensation* Sec. 57.14 (discussion of social value and history of earnings impairment theories of compensation versus physical impairment theories of compensation), and Sec. 57.14(j) (wage loss compensation reduces

Congressional intent and the purpose of the Act is to compensate for lost wage earning capacity.[5] It is fundamental to the Act that "disability" is an economic concept. Section 902(10) defining disability has not been changed by Congress or abrogated by case law. As Justice Skelly Wright tersely stated in *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 799 (D.C. Cir. 1984), "[h]owever, as the question of disability is one of degree, so is the amount of recovery."

Because compensation for wage loss is defined by comparing pre-injury wages to post injury wage earning capacity, the Act expressly instructs, in detail, how both pre-injury wages and post injury wage earning capacity are to be calculated.[6] Section 8(h) mandates a multifactor analysis of the injured worker's wage earning capacity, whether actual post injury earnings fairly and reasonably measure loss of wage earning capacity and, if not, mandating a determination of fair and reasonable post injury wage earning capacity.[7] This method of determination of earning capacity is uniformly employed by the administrative law judges, the Benefits Review Board (BRB), and in the circuits.[8] Provisions of the Administrative

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economic waste by allocating limited compensation dollars to those with actual earnings impairment).

[5] *Long v. Director, Office of Workers' Compensation Programs*, 767 F.2d 1578, 1582 (9th Cir. 1985).

[6] 33 U.S.C. 908(c)(21), 910, 908(h).

[7] *See also, Randall*, 725 F.2d at 724-725 (citing *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979)).

[8] *Randall, supra; Bath Iron Works v. White*, 584 F.2d 569 (1st Cir. 1978); *Travelers Insurance Co. v. McLellan*, 288 F.2d 250 (2d Cir. 1961); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th

Procedure Act (APA), which are applicable to adjudication of claims arising under the Act by the federal administrative law judges of the Department of Labor, require adjudicators to make specific findings on all relevant evidence and ensure due process in the course of determining post injury wage earning capacity and compensation benefits.[9] Additionally, the BRB case law has adopted a formula for adjusting post injury wage earning capacity to the average weekly wage at the date of injury further protecting injured workers by ensuring fairness and reasonableness of determination of post injury wage earning capacity.[10]

Since the Benefits Review Board held that Section 922 modification may be granted based on changes in the claimant's earning capacity as well as changes in his/her physical condition in *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225 (4th Cir. 1985), the same factors of evaluating the original determination of post injury wage earning capacity have also been applied in modification proceedings.[11] And even before the BRB decision in *Fleetwood*, the Fifth Circuit recognized that modification based on a change in

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Cir. 1992); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399 (9th Cir.), *cert. denied*, 459 U.S. 1034, 103 S.Ct. 444 (1982); *Devillier, supra*; *Hughes v. Litton Systems, Inc.*, 6 BRBS 301 (1977).

[9] 5 U.S.C. Sec. 557(c); *see, Randall, supra*, at 724; *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975).

[10] *Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980).

[11] *See e.g., Randall*, 725 F.2d at 795.

earning power was in harmony with Congressional intent.[12]

The Act evidences further policy concerns with the continued economic viability of covered employers by providing that employer liability under the Act is to be exclusive and in place of all other liability for damages at law or in admiralty, 33 U.S.C. 905, and that, although the employee may either seek benefits under the Act or pursue a third party tort feasor, the employer must receive offset against its liability under the Act for all third party civil recoveries or other disability compensation received by a claimant.[13]

Section 939 of the Act, providing that the Secretary of Labor shall direct the vocational rehabilitation of permanently disabled workers under the Act, demonstrates Congressional concern with returning injured workers to productive roles in the economy and thereby limiting the ultimate liability of covered employers for on-going disability compensation during the lifetimes of injured workers.[14]

And Sections 908(f) and 944 of the Act reflect Congressional intent to provide employers with incentive to hire workers with pre-existing permanent disabilities by establishing the Special Fund, to be administrated by the

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[12] *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 771-72 (5th Cir. 1981).

[13] 33 U.S.C. 903(e), 933(a)-(i), *see, e.g., Aetna Life Insurance v. Moses*, 287 U.S. 530, 542 (1933) (affirming employers' lien and credit rights so as not to permit double recovery by a claimant and thereby increase costs of insurance required by the Act).

[14] 33 U.S.C. 939; *see*, Section 8(c)(21) (mandating payment of wage loss disability for the duration of the disability).

Secretary, which will assume payment of on-going permanent disability compensation in the event the disabled worker is further disabled consequent to an occupational injury. The Fund is financed primarily by mandatory annual contributions, or assessments, .by each self-insured employer or carrier covered by the Act.[15]

In 1984, in amending the Act, Congress again expressed its concern with creating a statutory scheme which provided adequate remedies for injured workers, promoted economic viability of maritime employers and insurers, and conserved scarce economic resources. The 1984 Amendments were drafted "to reduce the cost of Longshore coverage for employers in the covered industries in a manner which will disturb, to the most limited extent possible, the rights and benefits which the Longshore Act provides."[16] Congress intended to produce "a balanced product, one which retains important and needed protections for injured workers and their families, tempered by added employer, insurer, and Labor Department controls which will assure workers' compensation benefits to those deserving of them while also affording the means to better control program costs and abuse."[17]

Specifically, Congress recognized a pressing need to amend Section 44 in order to reduce government expenditures and encourage employer participation in

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[15] 33 U.S.C. 908(f), 944.

[16] 1984 U.S. Code & Cong. Admin. News 2736.

[17] House Report on Conference Report on S.38, L.H.W.C.A. Amendments of 1984 (September 18, 1984), *reprinted in* BRBS Rel. 256-11/84, at 5-85 (remarks of Representative Erlenborn).

monitoring cases in payment status when the Special Fund is paying on-going permanent disability compensation pursuant to Section 8(f).[18] To this end, the legislators amended Section 44 of the Act to base each employer's mandatory contribution to the Special Fund in part upon that employer's overall program participation and in part upon that employer's past utilization of the Fund. Thus, employers who placed more claims into the Fund for payment would be paying a greater share of the Fund's resources. However, Congress also changed Section 44 in order to provide employers with devices by which employers may maintain some control over claims in payment status. To this end, new earnings reporting requirements were imposed on claimants who receive on-going permanent disability compensation, whether from the employer or the Fund, and severe penalties are imposed on claimants who fail to report earnings upon request.[19]

Section 22 of the Act was also amended "to permit the modification of an award or review of a compensation claim at any time on the grounds of changed *circumstances* or mistakes."[20]

Considering Congressional intent and the purpose of the Act, considering the overall structure of the Act, and

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[18] House Report on Conference Report on S.38, L.H.W.C.A. Amendments of 1984 (Sept. 18, 1984), *reprinted in* BRBS Re. 256-11/84, at 5-84, 5-85 (remarks of Representative Miller).

[19] 1984 U.S. Code & Cong. Admin. News 2751.

[20] 1984 U.S. Code & Cong. Admin. News 2762 (emphasis added).

considering the practical effects of the Ninth Circuit decision below,[21] we respectfully suggest that the rule announced in the decision below undermines the balance between employer protections and delivery of benefits to deserving injured workers which Congress intended, is detrimental to the economic integrity of maritime employers, and impairs cost effective federal administration of the Act.

Given the perspective of the *Amicus* as a Longshore insurance carrier and experienced administrator of claims arising under the Act, including claims arising under Section 22 of the Act, we offer the following pragmatic discussion of why the decision below should be reversed.

ARGUMENT

I.

MODIFICATION OF PERMANENT DISABILITY AWARDS SUBSEQUENT TO CHANGE IN WAGE EARNING CAPACITY PRESERVES SCARCE ECONOMIC RESOURCES AND PROMOTES DELIVERY OF BENEFITS TO DESERVING WORKERS.

To illustrate how Section 22 modification proceedings work in harmony with the policies and intentions of Congress as discussed, *supra*, we offer the following factual example.[22]

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[21] *Rambo v. Director, Office of Workers' Compensation Programs*, 28 F.3d 86 (9th Cir. 1994).

[22] These facts are similar to an actual case which is, at the present time, pending before the Office of Administrative Law

The claimant, a thirty year old piledriver and union member for 12 years, injured his upper back in 1983 while lifting timber on the deck of a construction barge. Claimant's education was limited to a high school diploma and the job training as a laborer and piledriver which he had received from various marine construction employers over twelve years; however, as a senior union member and experienced piledriver, Claimant's hourly wage was $18.50; Claimant earned $44,500.00 during the year prior to his injury and had an estimated average pre-injury weekly wage of $855.77.

Claimant was treated for thoracic strain for two years without significant improvement in his subjective symptoms; he continued to have moderately severe pain upon lifting overhead and performing certain motions with his left arm and shoulder. Objective clinical testing evidenced possible thoracic outlet syndrome, and, in 1985, the treating orthopedic physician concluded that Claimant's condition was likely to remain stable into the indefinite future and it was inadvisable for Claimant to return to his pre-injury employment as a piledriver.

Claimant's claim for permanent total disability compensation was adjudicated by an administrative law judge who found that Claimant was permanently and totally disabled as the employer was, at the time of trial, unable to demonstrate the availability of suitable alternative employment given Claimant's limited education and vocational skills. Claimant continued to receive on-going

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Judges on the employer's motion for modification pursuant to Section 22.

permanent disability compensation at the statutory maximum rate with annual adjustments as announced by the Secretary for cost of living. Between 1985 and 1993, Claimant obtained a Bachelor of Arts degree with a concentration in international business from a state university, acquired computer skills, installed a personal computer in his home, and operated his own consulting business, at a loss, as a broker for international sales and purchases. Additionally, Claimant campaigned twice for a seat on his city council, travelled monthly out of state to various conventions and conferences of international business organizations, and vacationed several times each year at his favorite hunting and fishing locations. Claimant's physical condition remained the same; Claimant did not seek medical treatment and was able to control his physical symptoms through occasional use of over-the-counter pain medication and restricting his overhead movements and lifting activities with his left upper extremity.

Claimant's physical condition has not significantly changed; Claimant remains precluded from returning to his pre-injury employment as a piledriver. However, Claimant has rehabilitated himself by acquiring new vocational and social skills which, arguably, form the basis for employability. In this case, if the employer is allowed to move for modification of the existing permanent total disability award, the employer is granted the opportunity to present evidence of the availability of suitable alternative employment in the open labor market considering Claimant's present age, education, vocational skills, and physical condition. The parties are afforded

the same due process protections as provided by the Act in the initial determination of disability.

Assuming Claimant is employable, the employer may be able to reduce or eliminate its liability for on-going disability compensation to Claimant, thereby alleviating costs of administrating one claim and freeing compensation dollars for payment of compensation to other injured workers who are not presently employable. The Claimant is prevented from, what is essentially, double recovery in that the Act was never intended to provide compensation to those who are not economically disabled.[23]

However, the rule announced in the decision below, precluding modification proceedings under these facts, escalates costs to both employers and insurance carriers where the maritime insurance carrier is legally obligated to continue disability payments to a worker who is capable of participating in the work force. The carrier's increased costs of continuing payments, which are no longer subject to reduction by means of modification proceedings, will be passed to employers thereby escalating insurance costs to the detriment of the industry and upsetting the balance between competing interests which Congress has intended and endeavored to maintain.

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[23] *See also, Blake v. Ceres, Inc.*, 19 BRBS 219 (1987) (In that case, a permanent total disability award was made before the employer could identify suitable alternative employment. It was held that the employer should be allowed on a Section 22 motion for modification to present evidence of suitable alternative employment as wage earning capacity is a factor in modification proceedings. Otherwise, the worker could refuse offers of jobs within his capabilities which become available after he obtains a total disability award).

Similarly, the rule announced in the decision below would harm an injured worker who was initially found to have some residual post-injury wage earning capacity and was awarded on-going permanent partial disability compensation but who later experienced further loss of wage earning capacity due to a change in circumstances beyond his control. Absent a change in the injured worker's physical condition, such a worker would be foreclosed from modification proceedings to increase disability compensation and be foreclosed from access to vocational retraining or education needed to secure a new niche in the labor market unless services were available at public expense.

For example, in *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990), the claimant was employed as a welder when, in 1981, he suffered a series of low back injuries which left him with medical impairments and ability to perform only light work. He received a permanent partial disability award and was placed in a light duty job in the San Francisco Bay area until he was laid off for lack of suitable available light duty work. The claimant was compelled to move his family to another geographical area in order to reduce his living expenses but was unable to obtain light work in that geographical area with his limited vocational skills and physical impairments. Acknowledging that his physical condition had not changed, the claimant requested modification and an increase of his disability compensation award. It was held that the standard for determining disability is the same during Section 22 modification proceedings as during the initial determination, i.e., the issue is whether

employment is available which is suitable for the claimant considering his age, education, skills, and physical condition, and, until the employer demonstrates the availability of suitable alternative employment, the claimant is entitled to permanent total disability.

However, under the rule announced below, Mr. Vasquez would not have been able to seek modification, receive an increase in disability compensation, or engage the employer or the Department of Labor in a successful effort to rehabilitate him into sustainable employment.

II.

FLEXIBILITY IN MODIFICATION PROCEEDINGS FURTHERS PUBLIC POLICY AND CONGRESSIONAL INTENT TO PROMOTE FULL EMPLOYMENT AND ENGAGE INDUSTRY EMPLOYERS IN THE PROCESS OF REHABILITATING INJURED WORKERS WHENEVER POSSIBLE.

Modification, by either employer or injured worker, of permanent disability awards based on a change in earning capacity provides economic rewards for employers' participation in delivering vocational rehabilitation and job training services to injured workers. Active participation in job development by industry generally promotes higher levels of employment and reduces government waste. It is in the employers' interest to provide an injured worker with modified employment, direct job placement into new employment, or vocational re-training if, through modification proceedings, the employer can limit, reduce, or eliminate its liability for on-going lifetime payments of disability compensation.

However, the decision below discourages employers from offering modified employment, direct placement assistance, or retraining services of any kind because, absent a change in the employee's physical condition, the employer would have no opportunity to reduce its liability for on-going disability compensation. The decision below also indirectly encourages employers to delay adjudication of permanent disability cases until all avenues of identifying suitable alternative employment are exhausted as, once an award of permanent disability is made, the employer would lose any economic advantage from rehabilitation of the injured worker into the labor market.

III.

ALLOWING MODIFICATION BASED UPON CHANGE IN EARNING CAPACITY REDUCES ECONOMIC WASTE BY REDUCING COSTS OF ADMINISTRATION OF 8(F) CLAIMS TO BOTH EMPLOYERS AND THE DEPARTMENT OF LABOR.

In cases where the employer has qualified for Section 8(f) relief, the decision below also escalates costs to U.S. Dept. of Labor and maritime employers. Without the ability to modify awards based on a change in earning capacity, the Special Fund will continue to pay on-going permanent disability compensation and bear the costs of administration of the Fund in some cases where the injured worker has returned to workforce or is able to return to gainful employment. Additionally, the Special Fund assessments to the employer will remain at a proportionately higher rate despite the lack of the claimant's economic disability.

The 1984 amendments to the Act included amendments to Section 44(c)(2) in order to make the employers' annual assessments more equitable between self-insured employers and carriers who transferred a larger percentage of their compensation claims to the Fund for payment under Section 8(f) than those who transferred fewer claims.[24] The formula by which assessments were calculated was changed to assess higher contributions from employers who received more 8(f) relief. Therefore, employers were also granted a continuing interest in those claims and the potential for adjustment or termination of compensation payments through modification proceedings as the employers' financial obligations to the Special Fund are directly tied to the number of cases and aggregate sum of on-going permanent disability payments being made by the Fund on behalf of each maritime employer.

For example, in the instant case, Petitioner, Metropolitan Stevedore Company, requested and was awarded Section 8(f) relief on account of claimant's pre-existing permanent partial disabilities. Petitioner, therefore, paid Respondent, Mr. Rambo, permanent partial disability payments for 104 weeks. Thereafter, the administration and payment of Mr. Rambo's on-going permanent partial disability compensation was assumed by the Fund. However, Petitioner's Special Fund assessment was increased to account for the addition of Mr. Rambo's case and aggregate disability payments to the overall expenditures of the Fund. Pursuant to the decision below, neither the

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[24] 130 Cong. Rec. S11621 (daily ed. Sept. 20, 1984); 130 Cong. Rec. H9732, H9734-35 (daily ed. Sept. 18, 1984).

Fund nor the Petitioner is able to obtain modification of the original total disability award despite Mr. Rambo's tripled earnings and stable and continuous employment; the Fund continues to pay disability compensation and expend costs of administration of the claim; the employer continues to pay its yearly assessment to the Fund at a rate increased for Mr. Rambo's claim.

Clearly, Congressional intent in amending Section 44 in 1984 was to reduce costs of administration of the Special Fund and to engage the participating employers in the process of monitoring payment of on-going awards. The amended Section 44 accomplishes Congressional purpose only if viewed in conjunction with modification proceedings on the basis of change in earning capacity. Therefore, the decision below conflicts with Congressional intent and public policy to reduce the costs to government of administration of the Fund and provide a regulatory environment in which maritime employers can continue to thrive.

CONCLUSION

The Longshore and Harbor Workers' Compensation Act was crafted by Congress to provide liberal and certain wage loss compensation to a particular group of covered martime workers while, at the same time, providing financial protections and incentives for covered maritime employers in order to ensure the economic future of the industry. The express provisions of the original statute, the subsequent amendments in 1984, and the legislative history reflect clearly legislative and public

policies in favor of balancing the needs of injured workers against the needs of employers, insurance carriers, and the Department of Labor.

The decision below has an adverse impact on the public policies in favor of maintaining the economic viability of the maritime industry, returning injured workers to productive roles in the economy, and reducing government waste through effective legislation and administration of federal programs.

The examples discussed herein, adapted from recent actual cases and controversies arising in the course of Longshore claims administration and Department of Labor adjudication, demonstrate how the rule as announced by the Ninth Circuit will adversely affect both public and private interests. We respecfully urge this Court to reverse the decision below thereby assuring the continued flexibilty of Section 22 modification of permanent disability awards based upon earning capacity and assuring the continued balanced operation of the statutory scheme as intended by Congress.

Respectfully submitted,

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